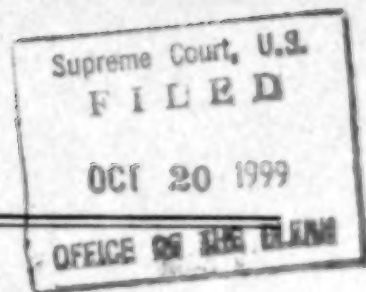


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No. 98-7450



IN THE
Supreme Court of the United States

SCOTT LESLIE CARMELL,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

**On Writ of Certiorari
to the Texas Court of Appeals**

**BRIEF OF THE *AMICI* STATES
IN SUPPORT OF TEXAS**

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INTERESTS OF THE *AMICI* STATES

The States have a substantial interest in the interpretation and application of the *Ex Post Facto* Clause of Article I, section 10 of the Constitution. Properly understood, the constitutional *ex post facto* prohibition prevents States from retroactively (1) applying new crimes, (2) eliminating affirmative defenses, or (3) increasing the punishments for crimes. But, as in this case, the States nonetheless have been confronted with *ex post facto* claims when the States have changed virtually any rule of evidence, criminal procedure, prison administration, or the statutes of limitation that apply to various offenses. This case presents the Court with an opportunity to clarify whether the constitutional *ex post facto* prohibition applies at all to changes in the States' laws that do not fall within the three traditional *ex post facto* categories. This issue arises with some frequency in litigation initiated against the States, particularly as the volume of prisoner suits has grown over the years.

SUMMARY OF THE ARGUMENT

The Court's decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), establishes that the *Ex Post Facto* Clauses in the Constitution apply only to retroactive changes that either (1) alter the elements of a criminal offense, (2) eliminate an affirmative defense, or (3) increase the punishment for an offense. *Collins* and other decisions of the Court make clear that the fourth category of *ex post facto* laws that Justice Chase identified in *Calder v. Bull*, 3 Dall. 386, 390 (1798)—changes in evidentiary rules that permit conviction on the basis of less testimony—has no legal significance independent of the three traditional categories. Indeed, there is no reason to give Justice Chase's fourth category any separate legal significance, because the concerns raised by retroactive changes in evidentiary rules are addressed by several other constitutional provisions and doctrines, such as general procedural due process principles, the right to confront witnesses, the right to

compulsory process, and the prohibition against bills of attainder.

Nor is there any merit to petitioner's suggestion that a change in an evidentiary rule can deprive him of a "defense" for *ex post facto* purposes. Only *affirmative* defenses that amount to legal *excuses or justification* for otherwise criminal conduct are "defenses" for *ex post facto* purposes. Thus, situations such as insufficient evidence of the crime, the incompetency of a witness, the scientific unreliability of evidence, or the existence of a statute of limitations are not "defenses" within the contemplation of the constitutional prohibitions on *ex post facto* legislation.

Petitioner's *ex post facto* claim must fail because the 1993 amendment to the Texas statute did not (1) alter the elements of an offense, (2) eliminate an affirmative defense, or (3) increase the punishment for an offense. Instead, the substantive criminal law of Texas has remained unchanged with respect to the sexual offenses for which petitioner was convicted.

ARGUMENT

I. THE 1993 AMENDMENT TO THE TEXAS "OUTCRY" STATUTE DID NOT CHANGE ANY ELEMENTS OF AN OFFENSE, ELIMINATE AN AFFIRMATIVE DEFENSE, NOR INCREASE THE PUNISHMENT FOR AN OFFENSE

A. Constitutional *Ex Post Facto* Prohibitions Do Not Apply To Changes In Procedural Rules That Do Not Alter The Elements Of An Offense, Eliminate An Affirmative Defense, Nor Increase The Punishment For An Offense

1. This Court Already Has Rejected The Proposition That The Fourth *Calder v. Bull* Category Of *Ex Post Facto* Legislation Has Legal Significance Independent Of The First Three Categories

This Court's decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), establishes that the fourth *ex post facto* category that Justice Chase identified in *Calder v. Bull*, 3 Dall. 386 (1798) (opinion of Chase, J.)¹—the only category on which the petitioner relies in this case—has no legal effect independent of the first three categories. Thus, the Texas statutory amendment at issue in this case cannot violate the *ex post facto* prohibition unless it either (1) defines a new crime, (2) aggravates the seriousness of a crime by, for example,

¹ Justice Chase identified four situations that, in his view, would contravene the constitutional *ex post facto* prohibition: (1) a "law that makes an action done before the passing of the law, and which was innocent when done, criminal"; (2) a "law that aggravates a crime, or makes it greater than it was, when committed"; (3) a "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"; and (4) a "law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." 3 Dall. 386, 390 (opinion of Chase, J.).

eliminating an affirmative defense, or (3) increases the punishment for a crime, none of which it does.

In *Collins*, this Court addressed a sex offender's claim that a new statute permitting an appellate court to reform an otherwise improper verdict (rather than require a new trial of the case) could not be applied retroactively. The Court unanimously rejected the sex offender's *ex post facto* claim. In doing so, the majority opinion disavowed any notion that Justice Chase's fourth category—retroactive changes in the rules of evidence—has any legal meaning or significance independent of the first three categories.

In his opinion for the Court, the Chief Justice pointed out that the Court has not endorsed Justice Chase's fourth category. 497 U.S. at 43 n. 3. Instead, the Court has adopted a "definition [that] omits the reference by Justice Chase in *Calder v. Bull* to alterations in the 'legal rules of evidence.' As cases subsequent to *Calder* make clear, *this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes.*" 497 U.S. at 43 n. 3 (emphasis added, internal citations omitted). The Court discussed several of those subsequent cases, some of which relied upon a distinction between "procedural" and "substantive" changes in the law, and declared that, in the *ex post facto* context, "it is logical to think that the term ['procedural'] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id.* at 45. The Court emphasized that labeling a law "procedural" does not insulate it from *ex post facto* challenge. Rather, the Court held that "the constitutional prohibition is addressed to laws, 'whatever their

form,' which make innocent acts criminal, alter the nature of the offense, or increase the punishment."² *Id.* at 46.

In *Collins*, the Court recognized that some of its older *ex post facto* decisions spoke in terms of changes in the law that deprived a defendant of "substantial protections", but the Court used the *Collins* case to expressly disavow such language. 497 U.S. at 45-46. Indeed, the Court overruled two decisions that the Court found inconsistent with the proper historical understanding of the *ex post facto* prohibition. *Id.* at 47-52 (overruling *Kring v. Missouri*, 107 U.S. 221 (1883), and *Thompson v. Utah*, 170 U.S. 343 (1898)). In so doing, the Court clarified that the constitutional *ex post facto* prohibition, as summarized in the *Calder v. Bull* categories, does not prohibit every "change which 'alters the situation of a party to his disadvantage.'" 497 U.S. at 50. "[S]uch a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases." *Id.*

Thus, even though the Texas statute at issue in *Collins* altered the law in a way that operated to the defendant's disadvantage in that case, the Court found no *ex post facto* violation. Instead, the Court concluded that

The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the Ex Post Facto Clause of Art. I, § 10.

² Thus, the States are not contending that a "procedural" change can *never* violate the constitutional *ex post facto* prohibition, but that it is likely to be a rare case in which such a violation occurs.

497 U.S. at 52. With all due respect, applying the same three standards to the Texas "outcry" statute at issue in this case, the only reasonable conclusion is that retroactive application of the 1993 amendment does not contravene *ex post facto* principles.

2. This Court's Decisions Subsequent To *Collins v. Youngblood* Confirm That Constitutional *Ex Post Facto* Prohibitions Are Not Implicated By Every Change In The Law That A Defendant Claims Is Detrimental

Since *Collins*, this Court on several occasions has reiterated the proposition that the *Ex Post Facto* Clause does not prohibit any and all retroactive changes in the law that may "disadvantage" an offender. Thus, in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), the Court declared that "[a]fter *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." 514 U.S. at 506 n. 3. Cf. *Kansas v. Hendricks*, 521 U.S. 346 (1997) (involuntary civil commitment statute that applies to sex offenders is not punitive and therefore does not violate *ex post facto* principles when applied retroactively to convicted sex offenders).

Indeed, this Court has expressly held that "whether a sanction constitutes punishment is not determined from the defendant's perspective." *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 n. 14 (1995). See also Harold J. Krent, *The Puzzling Boundary Between Criminal And Civil Retroactive Lawmaking*, 84 Geo. L.J. 2143 (1996). Thus, the mere fact that the 1993 amendment to the Texas statute may not please petitioner does not implicate the constitutional *ex post facto* prohibition. Instead, the questions are whether the Texas statute (1) created a new crime, (2) increased the punishment for the crime, or (3) altered the nature of the crime, for example, by eliminating an affirmative

defense. With all due respect, the 1993 amendment to the Texas statute did none of those things.

B. Other Constitutional Provisions, Such As The Right To Due Process, The Right To Confront Witnesses, The Right To Compulsory Process, And The Prohibition On Bills Of Attainder, Adequately Protect Defendants In The Circumstances Presented Here

Importantly, the Court's decision in *Collins* that the fourth *Calder v. Bull* category has no legal significance independent of the first three categories leaves no gap in the constitutional protection of criminal defendants. Other constitutional provisions adequately protect defendants such as petitioner in the context of changes or amendments to evidentiary or other procedural rules.

To the extent petitioner's complaint goes to the competency of his victim to testify against him, the Constitution already addresses those concerns in other provisions, making resort to the *ex post facto* prohibition unnecessary. Due process principles generally assure fundamental fairness in criminal proceedings. Basic procedural due process principles, for example, limit a State's ability to lower the State's burden of proof in criminal proceedings, e.g., *In re Winship*, 397 U.S. 358 (1970), and some civil proceedings. E.g., *Addington v. Texas*, 441 U.S. 418 (1979).³ General due process principles also apply to issues concerning the reliability and relevance of evidence. E.g., *Dawson v. Delaware*, 503 U.S. 159 (1992).

³ Thus, in the highly unlikely circumstance that a State enacted a statute that retroactively altered the State's burden of proof for some or all criminal offenses below the requirement of proof beyond a reasonable doubt, such a change would violate due process, whether applied retroactively or prospectively, and there would be no reason to invoke the *ex post facto* prohibition in order to declare the statute unconstitutional.

In addition, the Confrontation Clause of the Sixth Amendment limits the use of hearsay evidence, *see, e.g., Idaho v. Wright*, 497 U.S. 805 (1990), and limits the measures the States may take to shield even very young child witnesses from their alleged molesters. *See, e.g., Coy v. Iowa*, 487 U.S. 1012 (1988). The Compulsory Process Clause of the Sixth Amendment ensures that defendants have the assistance of formal judicial process to compel the presence and testimony of favorable witnesses.

Finally, Article I, § 10, the same provision that declares the *ex post facto* prohibition applicable to the States, also prohibits States from passing any bill of attainder. Thus, if the Texas legislature had amended the statute in order to target petitioner, or perhaps even child molesters generally, for retroactive punishment, the constitutional prohibition on bills of attainder might be implicated.

These substantial constitutional protections are directed more specifically than the *Ex Post Facto* Clause to issues arising from application of the rules of evidence to criminal defendants and the witnesses who may testify against them. Given the existence of these numerous provisions, and the scope of the protections they provide, there is simply no reason to stretch the constitutional *ex post facto* prohibition beyond its historical roots to encompass retroactive changes in rules of evidence that do not (1) create a new offense, (2) alter the nature of an offense, or (3) increase the punishment for an offense.

II. PROCEDURAL RULES DO NOT CREATE "DEFENSES" FOR *EX POST FACTO* PURPOSES

A. Only Rules That Affect The Legal Definition Of An Offense Constitute A "Defense" For *Ex Post Facto* Purposes

Collins v. Youngblood, 497 U.S. 37 (1990), makes clear beyond any doubt that the "defenses" which the *Ex Post Facto* Clause prohibits the States from altering retroactively,⁴ are "legal" defenses, not simply any rule or procedure a defendant might invoke to avoid prosecution or conviction. In *Collins*, the Chief Justice expressly declared for the Court that "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done." 497 U.S. at 49 (emphasis added). Thus, petitioner's argument that the amended Texas statute in this case deprives him of a "defense" for *ex post facto* purposes is completely without merit.

Insufficient proof to support a conviction, the incompetency of a particular witness to testify, the scientific unreliability of particular forensic evidence, or the time constraints imposed by a statute of limitations may be obstacles to the prosecution of a criminal offense in specific cases, but none of those situations amount to "defenses" to prosecution in the sense the *ex post facto* prohibition contemplates. As *Collins* expressly recognizes, for *ex post facto* purposes,

⁴ Strictly speaking, none of the first three *Calder v. Bull* categories refer to "defenses" at all, but this Court long appears to have recognized that retroactive elimination of an affirmative defense to a crime would create an *ex post facto* problem, apparently because it would "aggravate" the offense (the second *Calder v. Bull* category). *See, e.g., Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925) (a retroactive law "which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*").

“defense” means an *affirmative* defense of “justification or excuse” to criminal liability.

An affirmative defense is one that applies even though the State can prove beyond a reasonable doubt that the defendant committed the offense with which he has been charged. In other words, an affirmative defense is a legal *excuse or justification* for conduct that would otherwise be criminal. These defenses historically have included justifications such as self-defense, defense of others, immunity, privilege, or some other *legal* justification for the defendant’s conduct. Affirmative defenses, and thus the “defenses” recognized for *ex post facto* purposes, do not include procedural or evidentiary rules or even statutes of limitation that may, in a particular case, preclude a successful criminal prosecution.

B. The *Ex Post Facto* Clause Does Not Prohibit Changes In Evidentiary Rules

More than 100 years ago, the Court made plain that the *Ex Post Facto* Clause does not prohibit the States from retroactively changing rules of procedure or evidence, including laws that govern the competency of witnesses to testify, like the Texas statute at issue here. In *Hopt v. Utah*, 110 U.S. 574 (1884), the Court rejected an *ex post facto* challenge to a Utah law that changed prior law by permitting convicted felons to testify in criminal proceedings. At the time of the petitioner’s crime, the law of Utah forbade convicted felons from testifying in civil or criminal proceedings. But before petitioner’s trial, the law was changed to permit felons to testify in criminal proceedings, and a felon previously convicted of murder was then a key witness in the petitioner’s trial.

In rejecting the petitioner’s *ex post facto* claim in *Hopt*, the Court declared that “[s]tatutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage.” 110 U.S. at 589. In

reaching that conclusion, the Court reasoned that such a law did not criminalize a previously innocent act, aggravate any previously existing crime, provide a greater punishment for a crime, nor alter the degree of proof necessary to establish guilt. *Id.* The Court emphasized that evidentiary rules, such as those affecting the competency of witnesses to testify, “relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.” *Id.* at 590.

Similarly, in *Beazell v. Ohio*, 269 U.S. 167 (1925), the Court reiterated that “it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited.” *Id.* at 170. Furthermore, in *Beazell* the Court emphasized that “the constitutional [*ex post facto*] provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.” *Id.* at 171.

Thus, the 1993 amendment is simply outside the categories of retroactive laws the *Ex Post Facto* Clause prohibits. In essence, petitioner’s only complaint is that Texas in 1993 changed the rules regarding the competency of a juvenile witness to testify against him with respect to sexual offenses, a procedural change.⁵ The Court’s cases make clear that it is not *whether* anyone is adversely affected by a retroactive legislative change but, rather, *how* they are affected that

⁵ Petitioner also appears to suggest that the 1993 change is suspect because the Texas Legislature did not amend the statute broadly enough to apply to any minor victim of any crime, rather than limiting it to sex offenses. See Brief of Petitioner, Argument I.B. (final paragraph). But the scope of the amendment in that respect has no relevance to an *ex post facto* claim.

determines when a law violates the *ex post facto* prohibition.⁶ The only three ways that matter for *ex post facto* purposes are retroactive (1) changes in the definition of an offense, (2) increases in the punishment, or (3) elimination of an affirmative defense, none of which are present in this case.

C. The *Ex Post Facto* Clause Does Not Prohibit Changes In Statutes Of Limitation

Recently, the California Supreme Court applied *Collins v. Youngblood*, 497 U.S. 37 (1990), in the context of an *ex post facto* challenge to a retroactive change in the statute of limitations in a criminal case. That court held, in *People v. Frazer*, 21 Cal.4th 737 (1999), that a retroactive change in the statute of limitations does not implicate *ex post facto* protections.

In California, there is no statute of limitations for a small number of specified offenses. Cal. Pen. Code § 799. Otherwise, felony cases must be commenced either three years or six years after commission of the offense, depending upon the term of imprisonment prescribed for the crime. Cal. Pen. Code §§ 800, 801. Penal Code section 803 sets forth exceptions to these general rules and provides for the tolling or extension of the generally-applicable statutes of limitations.

In 1994, the California legislature added subdivision (g) to section 803 to provide that if an enumerated serious sex offense was committed upon a victim who was a child at the time, and if the normally-applicable statute of limitations had expired, a criminal case could be filed nonetheless if the case was initiated

⁶ For this reason, petitioner's reliance upon *Miller v. Florida*, 482 U.S. 423 (1987), is completely misplaced. See Brief of Petitioner, Arguments I.C., III. *Miller* is a case in which the *punishment* for the offense increased between the time the defendant committed the offense and the time of sentencing. *Miller* therefore, unlike this case, falls squarely within one of the three traditional *ex post facto* categories.

within one year of the date on which the victim reported the crime to a law enforcement agency and there was independent evidence that clearly and convincingly corroborates the victim's allegation. The legislature subsequently amended the statute to make clear its intent that section 803(g) be applied retroactively so as to permit the prosecution of crimes that were time-barred prior to 1994—the effective date of section 803(g).

In 1996, pursuant to section 803(g), Raymond Frazer was charged with one felony sex offense against a child, which was alleged to have been committed in 1984. He challenged the action, claiming the charge had been time barred in 1990, and retroactive application of the statute to permit his prosecution would violate the *Ex Post Facto* Clauses of the United States and California Constitutions.

The California Supreme Court rejected the claim.⁷ The Court began its analysis of the *ex post facto* issue by examining *Beazell v. Ohio*, 269 U.S. 167 (1925) and *Collins v. Youngblood*, 497 U.S. 37 (1990). These cases, the California Supreme Court found, set forth a two-part test: “Legislatures may not retroactively *alter the definition of crimes or increase the punishment* for criminal acts.” *People v. Frazer*, 21 Cal.4th at 756 (emphasis original) (quoting *Collins*, 497 U.S. at 43). This Court made clear in *Collins* and subsequent cases, the state supreme court stated, that “the two categories of impermissible retroactive legislation—redefining criminal conduct and increasing punishment—are exclusive.” *Id.*

The state supreme court further found that this Court, in *Collins*, had clarified language in *Beazell* prohibiting retroactive elimination of defenses to criminal charges. In

⁷ Frazer also argued that applying the new statutory provision to him violated due process principles. The majority held there was no *ex post facto* or due process violation; the dissent found a due process violation based on the state constitution, and so did not reach the *ex post facto* claim.

particular, the California Supreme Court read *Collins* to clarify that *Beazell* "should not be misread as creating a separate or third category of impermissible ex post facto legislation." *Frazer*, 21 Cal.4th at 757. Rather, *Collins* explained that this aspect of the ex post facto prohibition applies to retroactive changes that alter "the legal definition of the offenses" or "the nature or amount of the punishment imposed for its commission." *Id.* Accordingly, "the only 'defense[s]' that cannot be restricted or withdrawn for ex post facto purposes are those bearing on the 'definition' or 'elements' of the charged crime, or involving 'an excuse or justification for the conduct underlying such a charge.'" *Id.* (quoting *Collins*, 497 U.S. at 50).

Thus, the court held that "section 803(g) regulates the time at which child sexual abuse *defined and punished elsewhere in the Penal Code* may be charged, but it does not impermissibly withdraw a 'defense' as that term of art is used for ex post facto purposes in [*Collins*]." *Frazer*, 21 Cal.4th at 760. In other words, "[s]tatutes regulating the time at which a future criminal prosecution may be filed do not implicate the manner in which criminal conduct is defined and punished at the time it occurs—the sole concern of the ex post facto clause." *Id.* at 763. Hence, a retroactive change even in the statute of limitations applicable to a criminal offense does not violate ex post facto principles.

D. The 1993 Amendment Did Not Alter The Substantive Criminal Law Of Texas

Petitioner makes no claim that the 1993 amendment either (1) created a new criminal offense or (2) increased the punishment for existing offenses, (3) nor has he been deprived of any affirmative defense that was recognized at the time he committed sexual offenses against his stepdaughter. Because there has been no change in the substantive criminal law of Texas, petitioner's ex post facto claim must fail.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Texas's brief, the Court should affirm the judgment of the Texas Court of Appeals upholding petitioner's convictions.

Respectfully submitted,

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